Office - Supreme Court, U.
FILED
FEB 12 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 584

PAUL D. LYNCH,
Petitioner,

vs.

HOWARD J. GRUBER and ISABEL GRUBER,
husband and wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

HUGH M. MATCHETT,
DAVID F. MATCHETT, JR.,
WALTER F. DODD,
Chicago, Ill.

NED HALL,
Vancouver, Wash.

FRANK S. KETCHAM,
Washington, D. C.,
Counsel for Petitioner.

Dated: Chicago, Ill., February 4th, 1952.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0562

INDEX.

	PAGE
Preliminary statement	1
Opinions below	2
Jurisdiction	2
Questions presented	2
The Statute	3
The Rent Regulation for Housing	4
Statement	6
Facts	7
Specification of Errors	11
Reasons Relied On For Allowance Of Writ	14
I. The Court is completely in error	14
II. The precedent would seriously undermine rent control in the United States	17
III. There is a conflict in decision between the State Courts and Federal Courts	18
IV. The Supreme Court of Washington has simply disregarded the federal statute and regulation	19
V. The case presents an opportunity to settle the conflict in decisions among the Circuit Courts of Appeal as to whether in a suit based on a tie-in sale the overcharge is the entire consideration paid or only that portion in excess of the value of the secondary commodity	22
Conclusion	23

Cases Cited.

PAGE

Anchor Liquor Co. v. United States, 10th Cir., 158 F. 2d 221 22

Bowles v. Rupple, 3rd Cir., 157 F. 2d 944..... 19

Burton v. Katzman, 7th Cir., 187 F. 2d 703..... 19

Forat v. Rauer, 2nd Cir., 192 F. 2d 861.....14, 18

Garrett v. Moore-McCormack, 63 S. Ct. 246, 317 U.S. ~~380~~ 239..... 19

Hancock v. Eck, 7th Cir., 183 F. 2d 632..... 19

Lynch v. Gruber, Wash., 234 P. 2d 529, Rec. 132: trial court, Rec. 9-12..... 2

Mahanor v. United States, 1st Cir., 192 F. 2d 873..... 19

Oakes v. Schinasi, 66 N.Y.S. 2d 276..... 18

Small v. Schultz, 7th Cir., 173 F. 2d 940..... 23

Testa v. Katt, 67 S. Ct. 810, 330 U.S. 386.....19, 20

United States v. Edenor, Inc., Civil Action 48-720, U.S. D.C.S.D.N.Y., unreported (Appendix II, pp. 32-42) 15, 18

United State v. Pileggi, 2nd Cir., 192 F. 2d 878..... 19

United States v. Thomas, Civil Action 2767, U.S.D.C. Conn., unreported (Rec. 145-149).....14, 18

Walker v. Gilman, 25 Wn. 2d 557..... 20

Woods v. Claving Realty Corporation, U.S.D.C.S.D. N.Y., 77 F. Supp. 533..... 19

Woods v. Gavensky, U.S.D.C. Conn., 88 F. Supp. 679.. 19

Woods v. Turner, 10th Cir., 172 F. 2d 313..... 22

Woods v. Willis, 5th Cir., 171 F. 2d 289..... 19

Federal Statutes.

PAGE

Emergency Price Control Act of 1942, as amended, 60 Stat. 664, 50 U.S.C. App. 901 et seq. 6, 17, 25
Sections: 1a 15, 18, 25
205e 2, 3, 4, 26
302 ..... 4, 27
Housing and Rent Act of 1947, as amended, 61 Stat. 193, 50 U.S.C. App. 1891 et seq. 17, 23
Section 205a 23
62 Stat. 929, 28 U.S.C. 1257(3) 2

Federal Regulations.

Rent Regulation for Housing (10 F.R. 13528) 6, 17, 28
Sections: 2 ..... 4, 29
9 ..... 2, 5, 30
10 ..... 6, 30
13 ..... 5, 16, 30
Controlled Housing Rent Regulation (14 F.R. 5711) .. 17

Washington Court Rules.

Rule 6(9), Rules of Pleading, etc., 34 A Wn. 2d 72 21
Rule 63, Rules on Appeal, 34 A Wn. 2d 65 21
Appendix I 25
"A" Pertinent Provisions of the Emergency Price Control Act of 1942, as amended by Stabilization Extension Act of 1944 (50 U.S.C. App. 901 et seq.) 25
"B" Pertinent Provisions of Rent Regulation for Housing (10 F. R. 13528) 28
Appendix II 32
Certificate of Clerk of United States District Court for the Southern District of New York 32
Opinion of United States District Court for the Southern District of New York in United States v. Edenor, Inc., Civil Action 48-720 33

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. _____

PAUL D. LYNCH,
Petitioner,

vs.

HOWARD J. GRUBER and ISABEL GRUBER,
husband and wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Paul D. Lynch, respectfully prays for a writ of certiorari herein to review a final judgment of the Supreme Court of the State of Washington (Rec. 150), being the highest Court of said State, by which decision the said Court affirmed a judgment of the Superior Court of Clark County, Washington, after trial by the court sitting without a jury, that petitioner's complaint be dismissed at

his costs (Rec. 12) and that his motion for a new trial be denied (Rec. 14).

The action is one for treble damages under Section 205 (e) of the Emergency Price Control Act of 1942 as amended (Section 925e, 50 U.S.C. App. 901 et seq.). It is based on a violation of Section 9 of the Rent Regulation for Housing (10 Fed. Reg. 13528) which was in force during July and August, 1946. The cause of action arose in Chicago, Illinois.

Opinions below.

The opinion of the Supreme Court of Washington is reported as 234 P. 2d 529. It is printed in the Transcript of Record beginning at page 132. The opinion of the trial court is printed in the Transcript of Record beginning at page 9.

Jurisdiction.

The opinion of the Supreme Court of Washington was rendered and filed August 9th, 1951 (Rec. 132). A petition for rehearing filed September 7th, 1951 (Rec. 134), was denied October 3rd, 1951 (Rec. 150), and judgment was entered on that date (Rec. 150). Time for filing a petition for writ of certiorari, which would otherwise have expired January 2nd, 1952, was extended to and including February 15th, 1952, by order of Mr. Justice Douglas dated December 20th, 1951 (Rec. 154).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions presented.

1. Whether, in common law terminology, it is necessary for a plaintiff to prove that a relationship of landlord and tenant existed between the defendant and himself at the time of the transaction of which he complains in order for

him to recover a judgment for treble damages under the Emergency Price Control Act of 1942 as amended.

2. Whether proof that respondents, who were tenants in possession of an apartment subject to rent control, required petitioner to purchase their furniture as a prerequisite of surrendering occupancy of the apartment, and assigning or relinquishing whatever right to possession they may have had, to him, the consideration ostensibly paid for the furniture being in excess of the value of the furniture and in addition to the rental that the landlord was entitled to and did receive, would entitle the petitioner to recover a judgment for treble damages under the Emergency Price Control Act of 1942 as amended; and, if so, whether the entire consideration ostensibly paid for the furniture would be the overcharge or only that portion of the consideration paid in excess of the actual value of the furniture.

3. Whether the Supreme Court of the State of Washington has proceeded in such a manner that all substantive rights of petitioner under controlling Federal law have been protected, including the law of the State of Illinois if and insofar as the same may be applicable to the situation under the controlling Federal law.

The statute.

Section 205(e) of the Emergency Price Control Act of 1942 as amended provides:

> "If any person selling a commodity violates a regulation * * * the person who buys such commodity * * * may * * * bring an action against the seller on account of the overcharge. * * * For the purposes of this section the payment or receipt of rent * * * shall be deemed the buying or selling of a commodity, as the case may be. * * *".

It further provides:

> "and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price."

The Act provides:

> "The term 'price' means the consideration demanded or received in connection with the sale of a commodity,"

and

> "the term 'rent' means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations." (Section 302 b, g.).

Section 205(e) further provides:

> "In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus * * * such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based, as the court in its discretion may determine. * * *; provided, however, that such amount shall be the amount of the overcharge or overcharges * * * if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation."

See Appendix I "A."

The rent regulation for housing.

Section 2 of the Rent Regulation For Housing provides in part:

> "No person shall demand or receive any rent for or in connection with use or occupancy * * * of any housing accommodations * * * higher than the maximum rents provided by this regulation."

Section 13(10) states:

> "'Rent' means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or for transfer of a lease of such accommodations."

Section 9(a) provides:

> "General. The maximum rents and other requirements in this regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing accommodations, or by tying agreements or otherwise."

Section 9(b) provides:

> "Purchase of property as condition of renting. Specifically, but without limitation on the foregoing, no person shall require a tenant or prospective tenant to purchase or agree to purchase furniture or any other property as a condition of renting housing accommodations (Amdt. 44, 1-8-45) unless the prior written consent of the Administrator is obtained (Amdt. 67, 9-10-45)."

Section 13(9) provides:

> "'Tenant' includes a subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of housing accommodations."

Section 13(8) states:

> "'Landlord' includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing."

Section 10 provides:

> "Persons violating any provision of this regulation are subject to criminal penalties, civil enforcement actions and suits for treble damages as provided for by the Act."

See Appendix I "B."

STATEMENT.

Petitioner claims that respondents, who themselves were tenants, required him, a prospective tenant, to purchase their furniture in the apartment occupied by them for $2,500.00 as a condition of surrendering possession of their apartment and assigning or relinquishing whatever right of occupancy they may have had to him; that hence, in the language of the Rent Regulation for Housing (10 Fed. Reg. 13528), the Emergency Price Control Act of 1942 as amended (50 U.S.C. App. 901 et seq.), and the Amended Complaint (Rec. 7) which is couched in the general verbiage of the Regulation and the Act, respondents "rented" petitioner an apartment and required as a condition of "renting" said apartment that he purchase the furniture therein for the sum of $2,500.00: that as the payment made was in addition to the rent the landlord was entitled to and did receive it was an overcharge; and, consequently, petitioner is entitled to judgment against both respondents for $7,500.00 plus attorneys' fees and costs in the trial court and attorneys' fees and costs incident to review on appeal and certiorari (Rec. 5-6).

Respondents in their answer deny the allegations of the amended complaint and set up the defense that the purported cause of action was barred by limitations and the partial defense that any violation was not wilful (Rec. 7).

Petitioner denies the affirmative defenses (Rec. 18).

The trial court found that petitioner looked to the respondents for the furniture and to the landlord for possession of the premises (Rec. 108): that there were two separate transactions (Rec. 108): and, in any event, the cause of action, if any, accrued on July 28th, 1946, the date the preliminary negotiations were completed, more than a year before the commencement of the action on August 5th, 1947 (Rec. 1), and it is, therefore, barred by limitations (Rec. 106-108; 9-12).

Appeal was taken to the Supreme Court of Washington (Rec. 14) and twenty-seven Assignments of Error were assigned (Rec. 129) involving twenty-one questions (Brief of Appellant, pp. 1-7). The Supreme Court of Washington affirmed the judgment of the trial court (Rec. 134) on the sole ground that the relationship of landlord and tenant between respondents and petitioner never came into existence (Rec. 134). Petitioner filed a Petition for Rehearing (Rec. 134) which was denied (Rec. 150) and final judgment was entered against him (Rec. 150).

Petitioner now petitions this court for a writ of certiorari to issue to the Supreme Court of Washington to review that judgment. Sixteen errors are specified.

Facts.

On and prior to July 28, 1946, respondents occupied an apartment and paid rental at the rate of $45.00 a month. This was the amount fixed by a rent regulation. The rental contract expired April 30, 1946. Respondents continued their occupancy with the consent of the landlord at the same rental. Respondents desired to leave Chicago and to sell their furniture. Petitioner and his family had recently arrived in Chicago and were looking for an apartment.

Petitioner responded to an advertisement in a newspaper by respondents (Rec. 132).

The advertisement appeared in the Classified Advertising Section of the Chicago Sunday Tribune of July 28, 1946, on page 3 under the "To Rent—Apartments—North" column reading: "Very lovely lg. 4 rm. apt.—comp. furn. for sale; exc. n. side loc. Edg. 0287" (Pl. Ex. 1, Rec. 109).

Petitioner and his wife told respondents that they wanted an apartment (Rec. 21; 55). They asked about the nature of the furnishings that had been advertised for sale and inquired concerning the possibility of securing possession of the premises without purchasing the furnishings (Rec. 21; 34; 56). Respondents said it would be impossible to let the premises go without selling the furniture because they wanted to go to the west coast and it would be necessary to have the money from the sale of the furniture to do so (Rec. 21-22; 56). They said there was another couple interested in getting the apartment who had $2000.00 and only needed $500.00 more in order to get it (Rec. 24; 53; 62). Petitioner told respondents that he and his wife would have to give the matter further consideration (Rec. 24; 69) and they left the apartment (Rec. 24; 56; 80). After discussing the matter in the hallway they decided to meet respondents' demand, returned to the apartment, and informed them they had decided to take the apartment and buy the furniture (Rec. 80). Mr. Gruber told petitioner that while the landlord had consented to a transfer of the premises if Mr. Gruber could find suitable tenants it would be necessary for petitioner to secure the approval of the landlord before he could move into the apartment (Rec. 23). He cautioned petitioner not to do anything to arouse the suspicion of the landlord and said he would have to introduce him as a personal friend (Rec. 23) which he did (Rec. 23). Petitioner then negotiated with the owner of the property to rent the apartment (Rec. 133).

The landlord refused to give petitioner a lease for a year but took his request for the apartment under consideration (Rec. 23-24; 35-36; 70).

Petitioner and Mr. Gruber returned to the Gruber apartment (Rec. 70). He gave respondents a check for $200.00 (Pl. Ex. 2, Rec. 110) which he delivered to Mr. Gruber with the understanding that he would have time to raise the additional $2300.00 they demanded as a condition for the surrender of the premises (Rec. 25), and he prepared a paper or bill of sale or receipt covering the contents of the apartment (Rec. 37; 97; 102-106). It stated that petitioner was buying the furniture on condition he could get occupancy of the apartment (Rec. 102-106). Petitioner wrote it down, read it out loud, had Mr. Gruber sign it, and retained it in his own possession (Rec. 37, 102-106), until either he or his wife destroyed or threw it away as being without value (Rec. 37; 105-106). The $200.00 check was deposited in a bank on August 5th, 1946, by an endorsee, and paid by the bank on which it was drawn on August 6th, 1946 (Pl. Ex. 2, Rec. 110).

The landlord notified respondents a few days later that petitioner could have the apartment and they in turn notified petitioner (Rec. 71, 82). Petitioner called on the landlord on August 12th, 1946, and apparently saw either the landlord or his wife (Rec. 73, 83) who told him (Rec. 36-37) that the landlord had no objection to renting the apartment to him if Mr. Gruber was willing to assign his lease (Rec. 24). Petitioner then called on respondents (Rec. 83). Mr. Gruber and a girl friend of his wife were present (Rec. 83). Mrs. Gruber asked her to wait in her son Larry's room because this was a business matter (Rec. 83). Petitioner handed Mr. Gruber a certified check for $2300.00 (Pl. Ex. 3, Rec. 110) payable to Howard J. Gruber and signed by petitioner bearing date August 12th, 1946 (Rec. 49). Mr.

Gruber endorsed it over to Isabel Gruber who deposited it in their account in Chicago (Rec. 49; 50). Respondents had paid some rental in advance, for which petitioner reimbursed them, and they vacated the premises so he might take possession August 15th (Rec. 133). Petitioner then became the tenant of the owner of the building, and the tenancy of respondents terminated (Rec. 133) but the contractual liability did not terminate (Rec. 136). Mr. Gruber assigned his lease to petitioner on August 12th or on the 15th when petitioner and his wife took possession of the apartment (Rec. 26-27). He was given the tenant's copy of the lease (Rec. 27) which had been signed by the landlord (Rec. 38). It had expired April 30th, 1946 (Rec. 38). Petitioner vacated the apartment the following February and assigned the lease over to the tenant who succeeded him to whom he sold his furniture including that which he had purchased from respondents (Rec. 38).

The sale of the furniture to petitioner was not approved by the Office of Price Administration or its representative (Rec. 76).

Petitioner and his wife and Mrs. Gruber between them gave a complete and detailed inventory of the furniture involved in the transaction. With a few exceptions they were in agreement concerning the items sold. Briefly the furniture consisted of four rooms of ordinary second-hand furniture, i.e., chairs, rugs, tables, radios, beds, dishes, sheets, pillow cases, child's toys, etc. The furniture did not include any major household equipment such as a refrigerator, washing machine, dishwasher, stove, piano, or electric heater, nor did it include any antiques. Petitioner and his wife testified the furniture was only in fair condition; respondents testified it was in good condition. Petitioner and his wife testified that many items, particularly bric-a-brac, had no value. Petitioner said the furniture was

worth $500.00 (Rec. 33). His wife placed the figure at $800.00 (Rec. 59). Mr. Gruber said the furniture was worth $3500.00 (Rec. 74). Mrs. Gruber said the furniture was worth $2500.00 and that its replacement value was $3500.00 (Rec. 96-97). Mrs. Gruber admitted on cross-examination that the furniture had been accumulated over a period of about twelve years (Rec. 46) and that the average age of the furniture was from five to six years (Rec. 48). There was no ceiling on the furniture at the time of sale.

Neither the trial court nor the Supreme Court of Washington made any finding concerning the value of the furniture.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Washington erred in affirming the judgment of the trial court.

2. The decision of the Supreme Court of Washington is contrary to the law, the facts, and the law and the facts.

3. The Supreme Court of Washington erred in holding the tenancy of respondents terminated on August 15th, 1946, in the sense they were released from contractual liability to the landlord.

4. The Supreme Court of Washington erred in holding petitioner advanced the theory respondents with the consent of their landlord, *sublet* the apartment to petitioner for the remainder of their holdover term.

5. The Supreme Court of Washington erred in holding petitioner advanced the theory that *only* the amount paid *over* $800.00 was additional rental.

6. The Supreme Court of Washington erred in holding that petitioner advanced the theory that the amount paid was a bonus for *subletting* the apartment.

7. The Supreme Court of Washington erred in holding petitioner bases his right of recovery upon the claim that the common law relationship of landlord and tenant existed between respondents and himself.

8. The Supreme Court of Washington erred in holding that at the time of making the purchase of the furniture from respondents, petitioner *rented* the apartment *from* the owner of the building and not from respondents within the meaning of the word "*rented*" under the Rent Control Regulation For Housing and the Emergency Price Control Act of 1942 as amended by the Stabilization Extension Act of 1944.

9. The Supreme Court of Washington erred in holding that when respondents vacated the premises with the consent of the landlord their relationship of landlord and tenant ceased in the sense their contractual relationship terminated.

10. The Supreme Court of Washington erred in holding that the cited statutes of the state of Illinois and decisions of her courts had no application to the factual situation before it.

11. The Supreme Court of Washington erred in holding that in order for petitioner to recover in this action a landlord tenancy relationship between respondents and himself in a common law sense would have to be established.

12. The Supreme Court of Washington erred in holding that when we conclude that the relationship in a common law sense of landlord and tenant between respondents and petitioner never came into existence, it *follows* as a matter of course that the price control act and the regulation referred to have no application and give no remedy to petitioner.

13. The Supreme Court of Washington erred in its con-

struction of the amended complaint and in its failure to amend the amended complaint or to deem it amended to conform to the proof if the court did not believe that it did so.

14. The Supreme Court of Washington erred in disregarding petitioner's theory of an assignment of a lease and in not holding there was such an assignment.

15. The Supreme Court of Washington erred in holding that proof that respondents, who were tenants in possession of an apartment subject to rent control, required petitioner to purchase their furniture as a prerequisite of surrendering occupancy of the apartment, and assigning or relinquishing whatever right to possession they may have had, to him, the consideration ostensibly paid for the furniture being in excess of the value of the furniture and in addition to the rental that the landlord was entitled to and did receive, would not entitle the petitioner to recover for treble damages under the Emergency Price Control Act of 1942 as amended.

16. The Supreme Court of Washington erred in stating that under such circumstances the overcharge would only be the consideration paid in excess of the actual value of the furniture rather than the entire consideration paid.

DARK PAGE BLEEDTHRU

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The Court is completely in error.

The determination of the Supreme Court of Washington that "when we conclude that the relationship of landlord and tenant between respondents and appellant never came into existence, it follows as a matter of course that the price control act and the regulations referred to have no application and give no remedy to appellant" (Rec. 134) is completely in error. In *Forat* v. *Rauer* (2nd Cir.), 192 F. 2d 861, 862, the court said:

> "Defendant's contention that the payment of a bonus to the assignor of a lease does not constitute an overcharge of rent in excess of the maximum permissible rent under the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix, §§ 904(a), 925(e), unless the relation of landlord and tenant exists, is without substance. Rent includes 'consideration * * * received for * * * the transfer of a lease.' Rent Regulation for Housing in New York City Defense-Rental Area § 13(10), 8 Fed. Reg. 13914. The recovery provisions of the Act are not conditioned upon a finding of the relation of landlord and tenant. *Fleming* v. *Chapman*, 2 Cir., 161 F.2d 345. The later legislation itself defines rent to include any 'bonus' demanded or received for the transfer of a lease. Housing and Rent Act of 1947, 50 U.S.C.A. Appendix § 1892(e)."

In *United States* v. *Thomas*, Civil Action No. 2767, U. S. D. Ct. Conn., unreported, printed in the Transcript of Record at pages 145 to 149, the court said:

> "Defendant urges that no violation of the Housing and Rent Act of 1947, as amended, has been shown

because here defendant was not a landlord and did not receive rent for the premises but was merely an occupant offering, on a stated condition, to vacate in favor of the Reids and thus facilitate their hope for tenancy. Sec. 825.8(b), Rent Regulations under the Housing and Rent Act of 1947, as amended, 14 F.R. 5711, states that '*no person* shall require a tenant or prospective tenant to purchase or agree to purchase furniture or any other property as a condition of renting.' And a violation of this regulation, I hold, has been established by the finding that the defendant, a tenant in occupancy, required the Reids to purchase the furniture as a condition to his surrender of the tenancy thus making it possible for the Reids to become tenants. This interpretation of the regulation is required by the underlying legislative policy, inherent in the Act, to prevent excessive, unearned private gain from the existing housing shortage: if an owner with a capital investment at stake was to be precluded from such unearned gain, *a fortiori* it was intended that one without any capital investment at stake, who might be classified as a bystander, should not be allowed to profit from the shortage. This view is not at variance with the wording of Sec. 205 of the Act which reads: '*any person* who demands, accepts, or receives any payment of rent in excess of the maximum . . .' shall be liable for the penalties imposed. Thus the doctrine of *Small* v. *Schultz*, 173 F.2d 940, is applicable here."

See also decision of the United States District Court for the Southern District of New York in *United States* v. *Edenor, Inc.*, Civil Action 48-720, a certified copy of which is printed in Appendix II.

It is worthy of note that the Supreme Court of Washington completely disregards the underlying policy of the Emergency Price Control Act of 1942 as amended:

"to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency." (Sec. 1a, 50 U.S.C. App. 901a), (Appendix I).

It also ignores the special definitions of terms used in the Act and Regulation (Appendix I) when using those terms would solve the entire controversy. For a landlord and tenant relationship did exist between respondents and petitioner within the meaning of the term as used in the rent regulation. Section 13(8) states:

> "'Landlord' includes an owner, lessor, sublessor, assignee, or *other person receiving* or entitled to receive *rent* for the *use or occupancy* of any housing accommodations, or an agent of the foregoing." (Italics ours.)

Section 13(9) states:

> "'Tenant' includes a tenant, lessee, sublessee, or *other person* entitled to the *possession or use or occupancy* of housing accommodations." (Italics ours.)

This means of course entitled to possession or use or occupancy as against the person standing in the position of a landlord within the contemplation of the regulation because the words "landlord" and "tenant" have no meaning without reference to the other. Section 13(10) states:

> "'Rent' means the *consideration*, including any bonus, *benefit*, or gratuity, demanded or *received* for or in connection with the *use or occupancy* of housing accommodations or for the *transfer* of a lease of such accommodation." (Italics ours.)

If respondents, as petitioner claims and as the proof under any fair examination of this record establishes, required petitioner to purchase their furniture as a condition of surrendering occupancy of their apartment and assigning or relinquishing whatever right to possession they may have had to him, it can hardly be gainsaid that they demanded and received a consideration or benefit for or in connection with the use or occupancy of housing accommodations (i.e., *rent*) from petitioner who, as against them, before the transaction was not entitled to occupancy and use of

the apartment regardless of what his relationship to the owner may have been, and who, as against them, after the transaction was entitled to such occupancy and use, also regardless of what the relationship between him and the owner of the building may have been. By definition respondents were landlords and petitioner their tenant within the meaning of the Regulation.

II.

The precedent would seriously undermine rent control in the United States.

The determination of the Supreme Court of Washington that:

> "when we conclude that the relationship of landlord and tenant between respondents and appellant never came into existence, it follows as a matter of course that the price control act and the regulation referred to have no application and give no remedy to appellant." (Rec. 134),

is of paramount national importance since if permitted to stand as a precedent it would seriously undermine rent control in the United States. It would prevent the enforcement of The Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 901, *et seq.*), and the Rent Regulation for Housing (10 F.R. 13528) and The Housing and Rent Act of 1947, as amended (50 U.S.C. App. 1891, *et seq.*), and the Controlled Housing Rent Regulation (14 F.R. 5711), which are now in force, against all persons other than landlords. It would permit such persons to do what the landlords themselves cannot do and which it was the intention of Congress that no one should be permitted to do, i.e., to profiteer from abnormal scarcities of housing accommodations caused by and contributing to the national

emergency (Sec. 1a, 50 U.S.C. App. 901a). It would open the way to all kinds of stratagems by landlords, smarting under what would then be discriminatory legislation, and others to evade rent control in communities where rent control is still necessary to the welfare of the community.

III.

There is a conflict in decisions between State Courts and Federal Courts.

The determination of the Supreme Court of Washington that:

> "when we conclude that the relationship of landlord and tenant between respondents and appellant never came into existence, it follows as a matter of course that the price control act and the regulations referred to have no application and give no remedy to appellant." (Rec. 134),

and a similar decision of the Supreme Court of New York in *Oakes* v. *Schinasi,* 66 N.Y.S. 2d 276 (Special Term), which for some reason or other the Supreme Court of Washington fails to cite in its opinion, where the court came to the same conclusion as the Supreme Court of Washington, are in direct conflict with the decision of the United States Court of Appeals, 2nd Cir., in *Forat* v. *Rauer,* 192 F.2d 861, and the decision of the United States District Court for the District of Connecticut in *United States* v. *Thomas,* Civil Action 2767, unreported, but a certified copy of which opinion is attached to the Petition for Rehearing and is printed at page 145 of the Transcript of Record, and the decision of the United States District Court for the Southern District of New York in *United States* v. *Edenor, Inc.,* Civil Action 48-720, unreported, a certified copy of which is printed in Appendix II. They are not in harmony with the decisions of the United States Courts of Appeals in:

Mahanor v. *United States* (1st Cir.), 192 F.2d 873; *United States* v. *Pileggi* (2nd Cir.), 192 F.2d 878; *Burton* v. *Katzman* (7th Cir.), 187 F.2d 703; *Hancock* v. *Eck* (7th Cir.), 183 F.2d 632; *Woods* v. *Willis* (5th Cir.), 171 F.2d 289; and *Bowles* v. *Rupple* (3rd Cir.), 157 F.2d 944; and decisions of United States District Courts in *Woods* v. *Gavensky* (U.S. D. C. D. Conn.), 88 F. Supp. 679; and *Woods* v. *Claving Realty Corporation* (U.S. D. C. S. D. N.Y.), 77 F. Supp. 533.

IV.

The Supreme Court of Washington has simply disregarded the federal statute and regulation.

The decision of the Supreme Court of the State of Washington is so completely in error that to permit it to stand as a precedent is merely to yield to the doctrine that each state can decide for itself whether an act of the federal government shall be enforced. Under such circumstances this Court did not hesitate to issue a writ of certiorari in *Testa* v. *Katt*, 67 S. Ct. 810, 330 U.S. 386, where it required the courts of the State of Rhode Island to entertain cases arising under the Emergency Price Control Act of 1942, anything in the law of that jurisdiction notwithstanding. It did not hesitate to do so in *Garrett* v. *Moore-McCormack*, 63 S. Ct. 246, 317 U.S. 239, where it held that:

> "Pennsylvania having opened its courts to petitioner to enforce federally created rights, the petitioner was entitled to the full scope of these rights." (63 S. Ct. 246, p. 253, 317 U.S. 239, pp. 248-249).

Both decisions are applicable here.

That the Supreme Court of Washington has a dislike of the whole system of Federal rent control is apparent in both the majority and minority opinions of the Supreme

Court of Washington sitting *in banc* in *Walker* v. *Gilman*, 25 Wn 2d 557, where the majority reluctantly decided to permit the courts of that state to entertain suits under the Emergency Price Control Act of 1942, and the minority wanted to follow the Rhode Island Supreme Court in refusing to do so. (In fairness—*Testa* v. *Katt*, 67 S. Ct. 810, 330 U.S. 386, had not yet been decided.)

Disregard is reflected throughout the present record and has apparently warped the judgment not only of the Supreme Court of Washington but of the trial court as well in reaching their conclusion that respondents are not subject to liability under the Emergency Price Control Act of 1942 for what they have done. For how else can one account for the conclusion of the Supreme Court of Washington that a landlord and tenant relationship is necessary to recovery when that act and the Rent Regulation For Housing make no such requirement an element of a cause of action; its failure to refer to and consider the policy behind the legislation in reaching a decision; its failure to refer to and consider the special definitions of "rent" and "landlord" and "tenant" used in the regulation and the act; its misstatement of petitioner's own theory of the case which is evidenced by its substitution of the word "sublet" for "assignment of a lease" and the assertion that "Appellant bases his right of recovery upon the claim that the relationship of landlord and tenant existed between respondents and himself" when the words "landlord" and "tenant" do not appear in either the pleadings or the briefs insofar as any relationship between respondents and petitioner is concerned; its refusal to consider whether there was an assignment of a lease under the Illinois statutes and common law and its refusal to consider the law of that state in determining the nature of respondents' tenancy which would support the theory that a lease had been assigned

between the parties to this litigation; and its failure to construe the amended complaint according to the special definitions used in the regulation and the act and in its failure to amend the amended complaint, or to deem it amended to conform to the proof if the court did not believe that it did so, which it had the power to do under Rule 6(9) Rules of Pleading, etc. and Rule 63, Rules on Appeal of the Supreme Court of Washington and the duty to do by Rule 63 Rules on Appeal (34A Wn. 2d 72, 65)? See Petition For Rehearing (Rec. 134-149) and appropriate references to briefs referred to therein. How else can one account for the conclusion of the trial court that the cause of action was barred by limitations when there could be no dispute but that $2300.00 was paid within the year period in which the suit was filed: its determination that petitioner looked to the landlord for possession of the apartment when the landlord did not have possession and could not get possession: and its finding of fact that petitioner first purchased the furniture and "then inquired of defendants about renting said apartment" when petitioner had no use for the furniture or place to keep it unless he obtained occupancy of the apartment and which contention respondents were forced to abandon in the Supreme Court because it could not stand examination (Reply Brief, pp. 2 to 7; and references therein to Brief of Respondents and Record; Brief of Appellant, pp. 82 to 101)?

It is a serious matter when the highest court of one of the states disregards an Act of Congress and the decisions of the Federal courts construing it and renders a decision which if permitted to stand will in any respect nullify the enforcement of the federal law in that jurisdiction as far as the state courts are concerned and prevent one who has earned a reward promised by the Federal Government from receiving it, which is what has happened in this case. Unless a citizen of one state can go into the courts of

a sister state and submit his cause to the courts of that state with the assurance that his federal rights will be protected, national policy will be frustrated at the enforcement level. The only way to insure that this country will remain an effective sovereign union is for this court to grant certiorari in those cases where the Federal law has not been enforced by the state courts. Certiorari should be granted in this case.

V.

This case presents an opportunity to settle the conflict ~~as to~~ in decisions among the Circuit Courts of Appeal as to whether in a suit based on a tie-in sale the overcharge is the entire consideration paid or only that portion in excess of the value of the secondary commodity.

If certiorari be granted it will give this Court an opportunity to settle a dispute that has arisen among the Circuit Courts of Appeal in regard to the method of determining the overcharge in a suit under the Emergency Price Control Act of 1942 based on a tie-in sale. The United States Court of Appeals for the Tenth Circuit on two occasions has held that the overcharge is the entire consideration paid without regard to the value of the secondary commodity. *Anchor Liquor Co.* v. *United States*, 158 F.2d 221; *Woods* v. *Turner*, 172 F.2d 313. Petitioner believes that view to be correct although admitting that a defendant has a right in a separate action to sue for and recover a judgment for the value of the secondary commodity and to have the execution on that judgment set-off against the execution on any judgment the plaintiff might obtain. The United States Court of Appeals for the Seventh Circuit holds that the amount of the overcharge is only that portion of the consideration paid

in excess of the value of the secondary commodity. *Small* v. *Schultz*, 173 F.2d 940. The majority of the Courts of Appeal follow the decision in *Small* v. *Schultz*, 173 F.2d 940. The controversy should be settled by this Court.

The question does not arise under the Housing and Rent Act of 1947, as amended, because under Section 205(a) of that act the overcharge is limited to liquidated damages (50 U.S.C. App. 1891, *et seq.*).

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER F. DODD,
Chicago, Ill.

HUGH M. MATCHETT,
Chicago, Ill.

DAVID F. MATCHETT, JR.,
Chicago, Ill.

NED HALL,
Vancouver, Wash.,

FRANK S. KETCHAM,
Washington, D. C.,
Counsel for Petitioner.

Dated: Chicago, Ill.
February 4th, 1952.